SUPREME COURT, U. S.

In the Supreme Court of the United States

_____ TERM 1974

NO. 73-1991

CITY OF NAPLES,

Petitioners

vs.

THE PREPAKT CONCRETE COMPANY
and AMERICAN EMPLOYERS'
INSURANCE COMPANY,

Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

CARL R. PENNINGTON, JR. of
the law firm of
Pennington, Wilkinson & Sauls
Post Office Box 3985
Tallahassee, Florida 32303

Attorneys for Petitioner

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented For Review	2
Applicable Federal Statutes	4
Statement of Case and Facts	8
Jurisdiction of the Court of First Instance	11
Reasons Relied on For the Allowance of the Writ	12
Conclusion	20
Certificate of Service	22
Appendix A - Opinion Below	App. 1
Appendix B - Opinion Below	App. 7
Appendix C - Stay Order	App. 11

CITATIONS

Page

Cases

Schoenamsgruber v. Hamburg American Line
294 U.S. 454 (1935)..... 14, 15

Shanferoke Coal & Supply Corp. v. Westchester Service Corp.,
293 U.S. 449 (1935)..... 13, 14

Chatham Shipping Co. v. Fertex Steamship Corp.,
352 F.2d 291 (2nd Cir. 1965)..... 16

City of Naples v. Prepakt Concrete Company,
490 F.2d (5th Cir. 1974)..... 1

City of Naples v. Prepakt Concrete Co.,
Unreported (5th Cir. 1974)..... 1

Farr & Co. v. CIA Intercontinental De Navegacion,
243 F.2d 342 (2nd Cir. 1957)..... 16

Hetherington & Berner, Inc. v. Melvin Pine & Co.,
256 F.2d 103 (2nd Cir. 1958)..... 20

Merchant v. Meade-Morrison Mfg. Co.,
29 F.2d 40 (2nd Cir. 1928)..... 19

New England Power Co. v. Asiatic Petroleum Corp.,
456 F.2d 183 (1st Cir. 1972)..... 13

Statutes

9 U.S.C. 14

9 U.S.C. Section 3 ..... 4, 17

9 U.S.C. Section 4 ..... 4, 5, 15, 16 17, 18

9 U.S.C. Section 9 ..... 6, 7, 18

9 U.S.C. Section 10 ..... 7, 8

28 U.S.C. Section 128 ..... 14, 15

28 U.S.C. Section 129 15
28 U.S.C. Section 225 ..... 14, 15
28 U.S.C. Section 227 15
28 U.S.C. Section 1254(1) 2
28 U.S.C. Section 1291 ..... 8, 13
28 U.S.C. Section 1332 12
28 U.S.C. Section 1441 12

Rules

Rules of Supreme Court 23(g) 11

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM 1974

NO._____

CITY OF NAPLES,

Petitioner,

vs.

THE PREPAKT CONCRETE COMPANY and AMERICAN EMPLOYERS' INSURANCE COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

The Petitioner, CITY OF NAPLES, prays that the Supreme Court of the United States issue its Writ of Certiorari to review the hereinafter-described opinions and judgments of the United States Court of Appeals, Fifth Circuit.

OPINIONS BELOW

The initial opinion of the United States Court of Appeals, Fifth Circuit, is reported in City of Naples v. Prepakt Concrete Company, et al., 490 F. 2d 182 (5th Cir. 1974). The opinion of the Court on rehearing was rendered through opinion dated May 23, 1974. A copy of each of said opinions is appended hereto.

JURISDICTION

The United States Court of Appeals, Fifth Circuit, entered its opinion herein on February 22, 1974, and based upon a timely Petition for Rehearing rendered an opinion on rehearing dated May 23, 1974. Said Order on Rehearing denied the Petition for Rehearing filed herein by Petitioner. No order granting an extension of time within which to file this Petition for Writ of Certiorari has been sought or obtained. The said Court of Appeals entered an order on June 10, 1974 staying the issuance of the mandate. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

The Petitioner, CITY OF NAPLES, on May 26, 1970, filed an action at law in the Circuit Court of the Twentieth Judicial Circuit in and for Collier County, Florida against Respondent, THE PREPAKT CONCRETE COMPANY, (the Contractor) and Respondent, AMERICAN EMPLOYERS' INSURANCE COMPANY, (the Surety). On May 28, 1970, the Contractor and Surety filed a Petition for Removal to the District Court of the Southern District of Florida, Miami Division, together with its removal bond. On June 29, 1970, the Contractor and Surety filed a pleading entitled "Notice of Hearing and Motion for Stay of Arbitration", which motion prayed for the entry of an order compelling arbitration and for an order staying the pending litigation. On July 14, 1970, the Petitioner filed a Motion to Remand the cause to the State Court. On July 20, 1970, the Contractor and Surety filed an additional removal bond. On September 9, 1970, the Contractor and Surety filed a "Cross-Motion to Amend Petition for Removal" requesting leave to amend its Petition for Removal. By Order dated October 21, 1970, the United States District

Court, Southern District of Florida entered an Order: (1) denying Petitioner's Motion to Remand; (2) granting the Contractor's and Surety's Cross-Motion to Amend Petition for Removal and granting ten (10) days within which said parties could file amendments; (3) granting the Contractor's motion to compel arbitration; and (4) granting the Surety's motion for stay of proceedings pending arbitration. Thereafter, on October 30, 1970, the Contractor and Surety filed an Amended Petition for Removal.

On November 20, 1970, the Petitioner filed a Renewal of Motion for Stay of Arbitration and Motion to Remand. Such Motion was denied by order of the District Court entered November 30, 1970. Arbitration proceedings were thereafter held and an arbitration award was entered. On August 15, 1972, the Petitioner filed with the Florida District Court a Motion to Vacate and Set Aside the Award of the Arbiters and to remand the cause to the State Court. Petitioner also filed a Motion requesting that the Arbitration Association be required to transfer to such Court the transcript of the arbitration proceedings for review by said Court. On September 25, 1972, the Contractor filed a Motion to Stay Petitioner's Motion to Vacate and set aside the arbitration award. By Order dated December 6, 1972, the District Court entered an Order granting the Petitioner's motion to compel the Arbitration Association to transmit the record to such Court and enjoined the parties from proceeding in any other District Court of the United States to litigate the issues involved in the controversy. The Respondents herein filed an Interlocutory Appeal from said last-mentioned Order, and it is from the Court of Appeals' Opinions relating to such Appeal that the above-described opinions arise. The questions hereby arising are:

(1) Whether the Order of the United States District Court, Southern District of Florida, entered on October 21, 1970, granting the Contractor's motion to compel arbitration

and staying the Court proceedings constituted a final judgment or order or constituted an interlocutory order;

(2) Whether the United States District Court for the Southern District of Florida has jurisdiction and venue in the pending cause or whether such jurisdiction and venue is vested in the United States District Court for the Northern District of Ohio.

APPLICABLE FEDERAL STATUTES INVOLVED

Sections 3, 4, 9 and 10 of Title 9 and Section 1291 of Title 28, United States Code, are pertinent hereto and provide as follows:

§ 3. Stay of proceedings where issue therein referable to arbitration

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order

to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an

issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for

the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

§ 10. Same; vacation; grounds; rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration-

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to

the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

§ 1291. Final decisions of district courts.-

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

STATEMENT OF CASE AND FACTS

On May 26, 1970, the Petitioner (hereinafter referred to as the "City"), filed an action at law in the Circuit Court of the Twentieth Judicial Circuit in and for Collier County, Florida against the Respondents (hereinafter referred to as the "Contractor" and the "Surety"). Thereafter, on May 28, 1970, the Contractor filed with the American Arbitration Association a Demand for Arbitration. On June 22, 1970, the Contractor and Surety filed a Petition for Removal to the District Court of the Southern District of Florida, Miami Division, together

with its removal bond, thereby seeking to remove the proceedings pending in the Circuit Court of the Twentieth Judicial Circuit in and for Collier County, Florida to the said Federal District Court. On June 29, 1970, the Contractor and Surety filed a pleading entitled "Notice of Hearing and Motion for Stay or Arbitration", which Motion prayed for the entry of an order compelling arbitration and for an order staying the pending litigation. On July 14, 1970, the City filed a Motion to Remand the cause to the State Court. On July 20, 1970, the Contractor and Surety filed an additional removal bond. On September 9, 1970, the Contractor and Surety filed a "Cross-Motion to Amend Petition for Removal", thereby requesting leave to amend its Petition for Removal as originally filed. By Order dated October 21, 1970, the Judge of the United States District Court, Southern District of Florida, hereinafter referred to as the "Florida District Court", entered an order: (1) denying the City's Motion to Remand; (2) granting the Contractor's and Surety's motion to amend their Petition for Removal and granting ten (10) days within which said parties could file amendments; (3) granting the Contractor's motion to compel arbitration; and (4) granting the Surety's motion for stay of proceedings. The Contractor and Surety thereafter filed an Amended Petition for Removal on October 30, 1970. On November 20, 1970, the City filed a renewal of its Motion to Remand and Motion for Stay of Arbitration. Such Motion was denied by the Florida District Court by order dated November 30, 1970. The City then filed a response to the Contractor's Demand for Arbitration, and in accordance with the order of the Florida District Court, filed with the Arbitration Association its claim against the Contractor and Surety for breach of contract.

Arbitration hearings were commenced in Cleveland, Ohio over the venue objection of the City and over the City's objection to the Arbitration Association's refusal to make the Surety

a party to said proceedings. Subsequently, such arbitration proceedings were partially held within the State of Florida.

The Arbitration Association entered an award on May 17, 1972, denying the claim of the City and ruling in favor of the claim of the Contractor. On August 15, 1972, the City filed with the Florida District Court its Motion to Vacate and Set Aside Award of Arbitrators and to Remand This Cause to State Court and also filed a motion requesting that the Arbitration Association be required to transfer to such Court the transcripts of arbitration proceedings for review by this Court. On September 25, 1972, the Contractor filed a motion to stay the City's said motion to vacate and set aside the arbitration award. Previously on June 19, 1972, the Contractor filed a motion seeking confirmation of such award in the United States District Court, Northern District Court of Ohio, Eastern Division (hereinafter referred to as the "Ohio District Court"), and the City thereafter filed a Motion to Dismiss said Petition and, subject to said Motion to Dismiss, moved said Court to vacate and set aside the award of the arbiters. By order dated December 6, 1972, the Florida District Court entered an order: (1) granting the City's motion to compel the Arbitration Association to transmit the record to such Court; and (2) enjoining the parties from proceeding in any other District Court of the United States to litigate the issues involved in the controversy.

It is from this last-mentioned order of the Florida District Court that the Contractor and Surety filed their "Notice of Interlocutory Appeal", which appeal was lodged with the United States Court of Appeals, Fifth Circuit, (hereinafter referred to as "the Court of Appeals").

The Court of Appeals rendered its initial opinion on February 22, 1974 vacating the injunction issued by the Florida District Court in its order of December 6, 1972. Thereafter, the

City filed a timely Petition for Rehearing and the Court of Appeals, on rehearing, entered its second opinion, dated May 23, 1974, which opinion denied the said Petition for Rehearing. It is the two (2) opinions of the Court of Appeals which the Petitioner seeks to have reviewed by this Court.

Throughout the proceedings, the City has consistently taken the position that: (1) the proceedings below were improperly removed from the State Court to the Federal Court; (2) the Order granting a stay of the Federal Court proceedings was error; (3) the Order requiring arbitration was error; (4) under the circumstances, none of the foregoing Orders were final judgments or orders; and (5) the Florida District Court had continuing jurisdiction of the proceedings and was and is the proper Court to enter a final judgment, to-wit, an order either confirming or setting aside said arbitration award.

The Court of Appeals held that the Florida District Court had been divested of jurisdiction and held that the Ohio District Court was the proper Court to either confirm or set aside the arbitration award. In order to reach such holding, the Court of Appeals, of necessity, had to hold and did so hold that the order entered by the Florida District Court on October 21, 1970, insofar as the same granted the Contractor's motion to compel arbitration and granted the Surety's motion for a stay of proceedings in the Florida District Court, constituted a final judgment or order.

JURISDICTION OF THE COURT OF FIRST INSTANCE

Jurisdiction of the Court of first instance, for the purpose of these proceedings and under this Court's Rule 23(g) is presumed to be the District Court of the Southern District of

Florida, Miami Division. The jurisdiction thereof was purportedly based upon Title 28, United States Code, Section 1332, which was allegedly removed under the provisions of Title 28, United States Code, Section 1441. (However, the Petitioner contends that said Florida District Court never properly obtained jurisdiction in that said Petition for Removal was obviously defective as was recognized by the said Florida District Court and Respondents by the filing of the Respondent's "Cross-Motion to Amend Petition for Removal", by the entry Order of the Florida District Court granting the motion to amend said Petition for Removal and by the filing of the Amended Petition for Removal (said Petition for Removal being filed on June 22, 1970 and the Amended Petition being filed over four (4) months later).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

In its present posture, the instant proceedings raised the troublesome question of whether the Florida District Court or the Ohio District had jurisdiction and venue of these proceedings at the current stage thereof. The answer to such question turns upon a determination of whether an order of reference to arbitration in pending legal proceedings is a final order or an interlocutory order. The question arises because of the Petitioner's previous reliance upon this Court's hereinafter cited opinions and because of the conflict of opinions in the Courts of Appeal. The Petitioner, City of Naples, contends that the Florida District Court has continuing jurisdiction and venue of the proceedings and the Contractor and Surety contend conversely that jurisdiction and venue is vested in the Ohio District Court. Each of said District Courts held that it has jurisdiction and constitutes the proper venue.

The contention of the City is based, in part, upon the proposition that among various other orders, the order of the

Florida District Court denying Petitioner's Motion to Remand and the Order granting a stay of the Florida District Court proceedings and requiring arbitration were not final orders or final judgments, but instead, if appealable at all, were appealable solely as interlocutory orders. The Court of Appeals tacitly recognized that if this position is correct, the Florida District Court must, of necessity, have jurisdiction for the purpose of entering a final order so that said previous interlocutory orders become absolutely reviewable. Otherwise, such interlocutory orders would enter the ether and remain in a perpetual state of limbo. The Court of Appeals recognized the well established rule that the denial of a Motion to Remand does not constitute a final order, but, in reaching its ultimate conclusion that the Ohio District Court was vested with jurisdiction, held in its opinion of February 22, 1974 that "the Stay Order and Arbitration Order were appealable" and, as stated in its opinion on rehearing, held "the Arbitration Order was an appealable final order within the meaning of 28 U.S.C. Section 1291". The Court of Appeals in reaching this conclusion stated in its opinion on rehearing "in this area of the law where there are 'medieval if not Byzantine peculiarities,' New England Power Co. v. Asiatic Petroleum Corp., 456 F.2d 183 at 189 (1st Cir. 1972), this Circuit has spoken." In reaching such conclusion, the Court of Appeals has impaled the Petitioner upon what the Court considers medieval, if not Byzantine peculiarities contrary to the express holdings of this Supreme Court. Petitioner will concede that the decisions in this area, as between Courts of Appeals, are in conflict. However, Petitioner believes that this Court has clearly established the rules of law applicable to the instant situation, which rules as established by this Court are in conflict with the opinions of the United States Court of Appeals, Fifth Circuit.

In the first of the two (2) controlling opinions of this Court, to-wit, Shanferoke Coal & Supply Corporation v.

Westchester Service Corporation, 293 U.S. 449 (1935), this Court reviewed an order of the United States Circuit Court of Appeals for the Second Circuit wherein said Court of Appeals had reversed an order of the District Court of the United States for the Southern District of New York denying a stay of action for damages for breach of contract until arbitration should be had in accordance with the terms of the contract. This Court affirmed the Court of Appeals decision. In affirming such decision, this Court held that the order staying the proceedings entered by the District Court was an appealable interlocutory order. Preliminary to deciding that question, this Court held that the order of the District Court denying the stay was not a final judgment appealable under then Section 128 of the Judicial Code, U.S.C. Title 28, Section 225. Thus, this Court has previously specifically held that such an order is not a final judgment and is appealable only as an interlocutory order. Accordingly, such order was an order which the Appellant in such case had the right to either have reviewed on an interlocutory appeal or which the said Appellant could have subsequently had reviewed upon appeal of a final judgment. Concededly, the opinion of this Court in Shanferoke, supra., related only to the appealability of a stay order and the specific question of whether an order requiring the parties to proceed to arbitration is a final order or is an interlocutory order was not considered. However, such question did arise in the case of Schoenamsgruber v. Hamburg American Line, 294 U.S. 454, (1935). In the Schoenamsgruber case, the District Court of the United States for the Northern District of California, Southern Division, entered an order requiring parties to libels in admiralty to proceed to arbitration and staying trial pending the filing of the award. In the trial proceedings the answers to the libel denied the material allegations thereof and alleged that the contract in question contained an agreement to arbitrate. The Respondents applied to the Court for arbitration under the United States Arbitration Act, Title 9, U.S.C., and the District

Court ordered the parties to proceed to arbitration and stayed the trial of the action pending the filing of the award. The Circuit Court of Appeals, Ninth Circuit, held such orders to be interlocutory and non appealable and dismissed the appeal taken from the District Court opinion. This Supreme Court held that such orders were not final orders and therefore, were not appealable under then Section 128 Judicial Code, U.S.C. Title 28, Section 225. This Court thereupon considered the question of whether or not such orders were interlocutory orders appealable under Section 129, Judicial Code, U.S.C. Title 28, Section 227, and held that orders requiring parties to proceed to arbitration were not appealable interlocutory orders and that, therefore, the same could be reviewed only on appeal from the final decrees.

The Fifth Circuit Court of Appeals, acknowledging that medieval peculiarities exist in this area of the law, attempted to distinguish the Schoenamsgruber case only on the basis that the same was an admiralty case and on the basis that the Court of Appeals two years after entry of the opinion in Schoenamsgruber, held that an order denying a Section 4 petition under Title 9 U.S.C. to compel arbitration was a final judgment and was therefore, appealable only as a final judgment and was not subsequently reviewable when the ultimate arbitration award became a final judgment of the Court.

Notwithstanding the Court's above holdings, there is case law that sets forth a distinction between whether or not the proceedings under review relate to an original petition seeking to have the matter under consideration referred to arbitration as contrasted to the raising of the arbitration provisions of a contract as a defense in pending litigation. Even if valid, such distinction would not be applicable in the case sub judice because in the instant case, the motion for stay and for order of reference to arbitration was first raised in pending litigation.

This distinction is recognized and pointed out by the United States Court of Appeals, Second Circuit, in the case of Chatham Shipping Co. v. Fertex Steamship Corporation, 352 F.2d 291 (2nd Cir. 1965). In such case that Court stated at page 249 of its opinion "However, the rule of this Court, established after full consideration, is that although an order directing arbitration is interlocutory when made in the course of continuing litigation, it is considered a final decision when handed down in an independent proceeding under Section 4 of the Arbitration Act" (emphasis supplied). It is clear that in the instant case there was no independent proceeding attempting to enforce the provisions of Section 4 of the Arbitration Act but instead, the motions relating thereto were filed in a pending action at law as a defense to such legal proceedings.

The United States Court of Appeals, Second Circuit, further discussed the above distinction in the case of Farr Co. v. C.I.A. Intercontinental De Navegacion, 243 F.2d 342 (1957). In Farr, supra., the Court of Appeals pointed out that before the case could be considered, the Court had to first determine whether the order in question was appealable. The Court had before it an order of the District Court requiring arbitration under a separate petition filed under Section 4 of Title 9, U.S.C. The Appellee contended that the order was interlocutory and not appealable. The Court of Appeals recognized that there might be a seeming inconsistency in the prior opinions of such Court, but stated that no such inconsistency existed in that the Court had held such orders appealable where the Order to Compel Arbitration was made in an independent proceeding under Section 4 of the Act while holding such orders not appealable when made in the course of a continuing suit. As above stated, the Petitioner herein, the City of Naples, believes such distinction to be immaterial in the instant case because of the fact that the distinction relates to whether said orders are appealable as interlocutory orders and not whether they

constitute final judgments. A review of the record will reveal that the Respondents herein never, in fact, moved for any order under Section 4 specifically but instead, simply moved for a stay under Section 3 of Title 9 and supplementary thereto, requested only in general terms that an order be entered requiring arbitration. However, the opinions of the Fifth Circuit and Second Circuit are in direct conflict with each other with relation to such point of law and the Fifth Circuit opinions are in conflict with the decisions of this Court.

That the order in question was not a final order (as conclusively established under this Court's above cited decisions) is further buttressed by the fact that in the instant case there were orders entered by the Florida District Court subsequent to the entry of the October 21, 1970 order and that the proceedings were of a continuing nature. For example, the order of October 21, 1970 granted the Respondents herein ten (10) days within which to file an amendment to their defective Petition for Removal. Thus, jurisdiction of the District Court admittedly could not become complete until after the entry of the order of October 21, 1970. In fact, an amended Petition for Removal was filed on October 30, 1970. On November 20, 1970, the City filed a renewal of its Motion to Remand and Motion for Stay of Arbitration, and such order was denied by order dated November 30, 1970. Furthermore, as reflected by the record, the Surety refused to become a party to the arbitration proceedings and the Arbitration Association refused to require the Surety to be a party thereto. Clearly, it was anticipated that in the event the Petitioner herein received an award which required the Contractor to pay damages to Petitioner, the Petitioner would be required to pursue in the Florida District Court proceedings attempting to secure judgment against the Surety.

Because of the foregoing it is abundantly clear that the Court of Appeals, as a matter of law, erred in holding that the orders of the District Court were final orders or final judgments, and it necessarily follows that the Florida District Court retained jurisdiction for the purpose of entering a final order or judgment herein, upon the entry of which the orders relating to stay of proceedings, denial of Motion to Remand and Order requiring arbitration would become appealable.

With regard to the second question to be considered by this Court, to-wit, which of the two (2) trial courts would have jurisdiction but for the fact that said orders of the Florida District Court were interlocutory and not final orders, the Petitioner respectfully submits that the opinion of the Court of Appeals is in conflict with holdings of other Courts of Appeal and is in conflict with the clear intent of the respective provisions of Title 9, U.S.C. With regard to the latter point, it should again be noted that Section 4 relates to a separate proceeding for an order requiring arbitration. Likewise, Section 9 of Title 9 under which the Contractor now attempts to have the award of arbiters confirmed, is a separate proceeding. The clear intent of Section 9 is for the confirmation of an award where arbitration has been held either without the entry of an order requiring arbitration or where an order requiring arbitration has been entered under a separate proceeding by virtue of the terms of Section 4. Certainly, neither Section was intended to apply to arbitration proceedings which were already the subject matter of an impending and continuing controversy over which a Federal District Court had already assumed jurisdiction. It is this latter point which, in reality, places the Court of Appeals, Fifth Circuit, in conflict with decisions of other Courts of Appeal. The Fifth Circuit has in essence held that the reference to arbitration by the Florida District Court and the confirmation thereof are totally separate legal proceedings (and this holding is made notwithstanding the continuing nature of

the Florida District Court proceedings). The Circuit Court of Appeals, Second Circuit, has specifically held that such proceedings are not independent proceedings but instead, are one continuing proceeding. For example, see Marchant v. Mead-Morrison Mfg. Co. 29 F. 2d 40 (2nd Cir. 1928), wherein the Supreme Court of the State of New York entered an order directing the parties to proceed in arbitration in accordance with their contract. Ultimately, after other proceedings, an award was entered by the arbiters. The Plaintiff in such arbitration proceedings then moved in the State Court for an order confirming the award and for the entry of judgment. Thereupon, the Defendant filed a Petition to Remove the Suit to the Federal District Court. The Plaintiff then moved to remand the case to State Court and such Motion for Remand was denied. The Defendant moved to vacate the award and the Plaintiff moved to confirm the award. In discussing the case before it, the Court of Appeals, Second Circuit, stated that when the suit was removed after the arbiters had made their award, it was upon the theory that the appointment of the arbiter was one proceeding and the application for judgment on that award was another or second suit. The Court of Appeals disagreed with such contention and specifically held, at page 43 of its opinion that such proceedings constituted

> "... all one arbitration proceeding, to settle the controversies which had arisen between the parties. They were not separable controversies. ....The proceedings from the outset had all the elements of a judicial controversy, to wit, adversary parties and an issue, in which the claim of one of the parties against the other capable of pecuniary estimation, was stated and answered in the same form of pleading. ....The appointment of the arbitrator was

> but a step in the relief sought by the plaintiff from the damages inflicted by the breach of contract. Having commenced the suit in the state court on an application for the appointment of the arbitrator, it would not have been permissable for the plaintiff to have proceeded later for its confirmation in the District Court of the United States upon the theory of a diversity of citizenship. . . ."

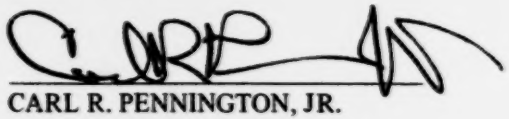
Also see Hetherington & Berner, Inc. vs. Melvin Pine & Co., 256 F. 2d 103 (2nd Cir. 1958) wherein the same Court held that where the Federal District Court had assumed jurisdiction and had entered an order "tantamount to an order of the Court that the parties arbitrate", Hetherington, supra., at 107, it was proper that proceedings in the State Court seeking to vacate an ultimate award of the arbiters be removed to the District Court inasmuch as the Motion to Vacate was in essence ancillary to and a continuation of the earlier suit. For these reasons, the opinion of the Fifth Circuit Court of Appeals that a petition seeking confirmation or vacation of an arbiters award is a separate proceeding is erroneous and is in direct conflict with the clear meaning of the applicable Federal Statutes and is in conflict with opinions of other Circuit Courts of Appeal.

CONCLUSION

The opinions of the Fifth Circuit and of the Second Circuit are clearly in conflict on the above matter, and the Fifth Circuit opinions are clearly in conflict with the decisions of this Court. Such Courts, in essence, admit the confusion and conflicts. It is important that this Court reiterate its prior holdings and clarify this area of law. Otherwise, other litigants will find themselves in the same predicament as Petitioner. Because

of such conflict, the Petitioner relied upon the holdings of this Court and treated the pertinent orders as interlocutory, but because of such conflicts, the Petitioner now finds that it has been deprived of substantial legal rights.

Respectfully submitted,



CARL R. PENNINGTON, JR.
of the law firm of
Pennington, Wilkinson & Sauls
Post Office Box 3985
Tallahassee, Florida 32303

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT, together with a copy of Appendix, has been served upon each of the following: Hynes and Diamond, 25 Broadway, New York, N. Y. 10004; Blackwell, Walker, Gray and Powers, First Federal Building, 100 N. E. 1st Avenue, Miami, Florida 33132; John C. Ausley, P. O. Box 391, Tallahassee, Florida, Attorneys for Respondents, by mail this 5th day of July, 1974.

Attorneys for Petitioner

CITY OF NAPLES, Plaintiff-Appellee,

v.

The PREPAKT CONCRETE COMPANY and American Employers' Insurance Company, Defendants-Appellants.

No. 73–1367.

United States Court of Appeals,
Fifth Circuit.

Feb. 22, 1974.

Florida city brought action in state court against Ohio corporation and its surety. The Ohio corporation removed case and successfully obtained stay of suit and an order compelling arbitration. Following arbitration which was conducted in Ohio, the Ohio corporation moved the United States District Court for the Northern District of Ohio to confirm the award. The United States District Court for the Southern District of Florida, Emett C. Choate, J., issued an injunction against further proceedings in the matter in any United States court other than the District Court for the Southern District of Florida. The Ohio corporation appealed. The Court of Appeals, Godbold, Circuit Judge, held that the Florida city waived its right to object to the Ohio locale for arbitrations selected by arbitration association when the city agreed in arm's length commercial contract to abide by the association's decision as to arbitration locale and that where the arbitration hearings had lawfully taken place in Ohio, diversity of citizenship existed and more than $10,000 was in controversy, the Ohio District Court was the proper court to confirm, vacate, modify, or correct the arbitration award.

Injunction vacated with direction.

Synopses, Syllabi and Key Number Classification
COPYRIGHT © 1974, by WEST PUBLISHING CO.

The Synopses, Syllabi and Key Number Classification constitute no part of the opinion of the court.

Appendix A

1. Arbitration and Award ⇐46

A proper locale for an arbitration hearing compelled by a federal court is waivable. 9 U.S.C.A. §§ 4, 9–11.

2. Arbitration and Award ⇐46

By agreeing in an arm's length commercial contract to abide by arbitration association's decision as to arbitration locale in case of dispute with Ohio corporation, city in Florida waived its right to oppose arbitration association's choice of Cleveland, Ohio, as the locale for the arbitration hearing. 9 U.S.C.A. §§ 4, 9–11.

3. Arbitration and Award ⇐72, 76

Where city in Florida had waived its objection to Cleveland, Ohio, as the locale for arbitration hearing, there was diversity of citizenship and more than $10,000 was in controversy, the United States District Court in Ohio was the proper court to confirm, vacate, modify, or correct the award in arbitration between the Florida city and Ohio corporation. 9 U.S.C.A. §§ 4, 9–11.

4. Contracts ⇐292½

Orders which granted stay of suit and which ordered arbitration between Florida city and Ohio corporation were appealable orders. 9 U.S.C.A. §§ 4, 9–11.

5. Arbitration and Award ⇐80

Where arbitrators absolved Ohio corporation and entered an award in its favor in dispute with Florida city, Ohio corporation's surety's liability to the Florida city was extinguished unless federal court in Ohio should modify the award in such a way as to hold the surety liable. 9 U.S.C.A. §§ 4, 9–11.

Appeal from the United States District Court for the Southern District of Florida.

Before THORNBERRY, GODBOLD and CLARK, Circuit Judges.

GODBOLD, Circuit Judge:

Prepakt, an Ohio corporation, and the City of Naples, Florida, entered into a contract that contained an arbitration clause. The contract did not specify the place where arbitration hearings, should they become necessary, would be held, but it implied that any dispute over locale was to be decided by the American Arbitration Association.[1] When a dispute arose the City sued Prepakt and its surety, American Employers' Insurance Company, in state court in Florida. Prepakt removed the case to the United States District Court for the Southern District of Florida and there successfully moved to stay the City's suit and to compel arbitration.

Prepakt's motion did not state where arbitration was to take place nor did the District Judge's order specify a locale. Prepakt wanted to arbitrate in Cleveland, Ohio,[2] but the City did not. The American Arbitration Association directed, over the City's objection, that the arbitration take place in Cleveland. The arbitration proceeded there and the arbitrators awarded Prepakt $90,000.

The statute empowering federal courts to compel arbitration states that the "hearing and proceedings . . . shall be within the district in which the petition for an order directing such arbitration is filed." 9 U.S.C. § 4 (1970). After arbitration was completed, however, different sections of the federal arbitration statute came into play, stating that an application to confirm the award "may be made to the United States court in and for the district within which such award was made," id. § 9, and that under appropriate circumstances, upon application of a party to the arbitration, the United States court in and for the district in which the award was made may vacate, modify, or correct an award. Id. §§ 10, 11.

1. The contract incorporated by reference the Construction Industry Arbitration Rules of the American Arbitration Association, which give the A.A.A. power to determine locale in cases of disagreement.

2. The District Court had before it several documents showing that this was the locale contemplated by Prepakt.

Pursuant to § 9, Prepakt moved the District Court for the Northern District of Ohio to confirm the award. At this point the City returned to the District Court in Florida, called the Judge's attention to § 4, and secured an injunction against further proceedings in the matter in any United States court other than the District Court for the Southern District of Florida.[3] Prepakt appeals from that injunction.

Prepakt argues that the Florida federal court departed from the federal arbitration statute by issuing an injunction and thus taking jurisdiction over the parties' dispute as to the correctness of the award. It urges that §§ 9–11 confer jurisdiction to confirm, vacate, modify, or correct an award exclusively upon the District Court in Ohio. As to the setting of a locale different from that of the arbitration-compelling court, in arguable conflict with § 4, Prepakt insists that the City waived its right to object by waiting too long to bring § 4 to the attention of the District Judge in Florida.

The City frames the issues differently. Arguing that there is a stayed but still pending suit in the District Court in Florida, it insists that nothing has happened to divest that court of jurisdiction to enjoin proceedings elsewhere.[4] Moreover, if the award is reviewed in Ohio rather than Florida, argues the City, it will be necessary to press appeals in two circuits in order to secure appellate review of the Florida District Court's threshold actions—denying the City's motion to remand to state court, staying the contract suit, and compelling arbitration—as well as of the Ohio District Court's decision on the merits of the award.

3. The court also commanded that the arbitration record be transmitted to it, presumably for confirmation, vacation, modification, or correction.

4. The City buttresses its position by urging that since Prepakt's surety, American Employers' Insurance Company, refused to appear or participate in the arbitration proceedings, the issue of the City's rights against the surety is still before the District Court in Florida.

[1, 2] Section 4's statement about the proper locale for an arbitration hearing compelled by a federal court is analogous to a venue provision,[5] and thus is waivable. We hold that by agreeing in an arm's length commercial contract to abide by the A.A.A.'s decision as to arbitration locale in cases of dispute, see note 1 *supra*, the City waived its right to oppose an Ohio locale.

[3] The City may be technically correct in urging that the federal court in Florida retained jurisdiction over the stayed lawsuit. Nevertheless, in view of § 9's command, and for reasons of judicial restraint and comity, the District Judge should have declined to enjoin the confirmation proceeding in the Ohio District Court. See Reed & Martin, Inc. v. Westinghouse Elec. Corp., 439 F.2d 1268, 1272–1273 (C.A. 2 1971). The arbitration hearing had lawfully taken place in Ohio, because of the City's waiver of the § 4 venue designation. Diversity of citizenship existed and more than $10,000 was in controversy.[6] Therefore, under § 9, the Ohio District Court was the proper court to confirm, vacate, modify, or correct the arbitration award. See id. at 1276.

5. Cf. Farr & Co. v. Cia. Intercontinental de Navegacion, 243 F.2d 342 (C.A. 2 1957), in which the Second Circuit held that a party's contractual agreement to arbitrate in a particular place gave the federal district court of that place (assuming it already had subject matter jurisdiction) *in personam* jurisdiction for purposes of compelling the party under § 4 to arbitrate. In the present case the contract specified no particular place, but the parties designated a method for choosing a place. See note 1 *supra*.

The City urges that Prepakt could have secured an Ohio arbitration locale without fear of transgressing § 4 by petitioning in the federal district court in Ohio to compel arbitration, and that by not having done so Prepakt in effect chose Florida as the locale for arbitration (and by implication for review of the award under §§ 9–11). But locale, if disputed, was not for Prepakt to choose at all. Both parties had surrendered that choice to the A.A.A., and it makes no difference whether the A.A.A. made a final choice before the petition to compel arbitration was filed (in which case the petitioning party would have known what court to file in) or afterward.

6. We do not hold that diversity and amount in controversy were necessary to confer jurisdiction under § 9, but only note that in this case they were present.

[4] We are not persuaded by the City's insistence that it will have to appeal in two circuits in order to secure review of all the issues in the case. The stay order and arbitration order were appealable.[7] Since the time for appealing them has long since run out, the City has lost its right to have them reviewed. The denial of the motion to remand, although it would not have been immediately appealable standing alone, nevertheless was reviewable in conjunction with the stay and arbitration orders. See Peters v. Standard Oil of Texas, 174 F.2d 162, 164 (C.A. 5 1949). Thus time has run out on it, too.

[5] Finally, we are unpersuaded by the City's insistence, see footnote 4 *supra*, that its action against Prepakt's surety in the Southern District of Florida somehow survives. The surety's liability is contingent upon Prepakt's liability. Since the arbitrators absolved Prepakt and entered an award in its favor, the issue of the surety's liability is necessarily extinguished too, unless, of course, the District Court for the Northern District of Ohio should modify the award in such a way as to hold Prepakt liable.

The injunction of the District Court for the Southern District of Florida is vacated with direction that the arbitration record be transmitted to the District Court for the Northern District of Ohio.

7. See Southeastern Enameling Corp. v. General Bronze Corp., 434 F.2d 330 (C.A. 5 1970), in which we held that an order granting a stay pending arbitration was analogous to an injunction order and hence appealable under 28 U.S. § 1292(a)(1) (1970). The same rationale applies to orders compelling arbitration. In fact, if anything it applies with additional force in the case of such orders. Compare New England Power Co. v. Asiatic Petroleum Corp., 456 F.2d 183 (C.A. 1 1972), in which the First Circuit, unlike this circuit, held a stay order nonappealable yet stated that an order compelling arbitration is appealable.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

CITY OF NAPLES, Plaintiff-Appellee,

v.

The PREPAKT CONCRETE COMPANY and American Employers' Insurance Company, Defendants-Appellants.

No. 73–1367.

United States Court of Appeals,
Fifth Circuit.

May 23, 1974.

Florida city brought action in state court against Ohio corporation and its surety. The Ohio corporation removed the case and successfully obtained stay of suit and order compelling arbitration. Following arbitration which was conducted in Ohio, the Ohio corporation moved the United States District Court for the Northern District of Ohio to confirm the award. The United States District Court for the Southern District of Florida, Emett C. Choate, J., issued an injunction against further proceedings in the matter in any United States Court other than the District Court for the Southern District of Florida. The Ohio corporation appealed. The Court of Appeals, 490 F.2d 182, vacated the injunction with directions. On petition for rehearing, the Court of Appeals, Godbold, Circuit Judge, held that arbitration order was an appealable final order.

Rehearing denied.

1. Contracts ⇐292½

Order directing arbitration of dispute between Florida city and Ohio corporation was appealable. 9 U.S.C.A. §§ 3, 4; 28 U.S.C.A. § 1291.

Synopses, Syllabi and Key Number Classification
COPYRIGHT © 1974, by WEST PUBLISHING CO.
The Synopses, Syllabi and Key Number Classification constitute no part of the opinion of the court.

INDEXED

Appendix B

2. Contracts ⇐292½

Denial of motion to remand was not immediately appealable standing alone but became appealable when it merged with final arbitration order.

Appeal from the United States District Court for the Southern District of Florida.

ON PETITION FOR REHEARING

(Opinion February 22, 1974, 5 Cir., 1974, 490 F.2d 182).

Before THORNBERRY, GODBOLD and CLARK, Circuit Judges.

GODBOLD, Circuit Judge:

The City's petition for rehearing questions the correctness of the holding that the arbitration order of the District Court for the Southern District of Florida was appealable and that the city is time-barred from now appealing therefrom. The petition relies upon Schoenamsgruber v. Hamburg American Line, 294 U.S. 454, 55 S.Ct. 475, 79 L.Ed. 989 (1934), for the proposition that an order granting arbitration is interlocutory and reviewable only upon appeal from final decree. Two years after *Schoenamsgruber* was decided this circuit noted that that decision was in an admiralty case and held that an order denying a § 4 petition to compel arbitration, entered in a suit at law claiming damages for breach of contract, was a final judgment and appealable. La Nacional Platanera v. North American Fruit & Steamship Corp., 84 F.2d 881 (CA5, 1936). For a statement of reasons supporting the correctness of our analysis of *Schoenamsgruber* see The Sydfold, 25 F.Supp. 662 (S.D.N.Y.1938). In *La Nacional* the order denied arbitration while in the instant case it granted arbitration. The latter is an *a fortiori* situation—the court by deliberative act has set in motion the arbitration, and the arbitrators take over the controversy and dispose of it subject only to possible application to a court to vacate or to enforce the award. For a discussion of the "functional" finality of an arbitration-com-

pelling order see Krauss Bros. Lumber Co. v. Louis Bossert & Sons, 62 F.2d 1004 (CA2, 1933).[1]

There are policy reasons pro and con in holding for appealability of orders entered under § 4, and at least one other circuit has held them appealable under neither 28 U.S.C. § 1291 nor *id.* § 1292(a)(1). Blount Bros. Construction Co. v. Troitino, 127 U.S.App.D.C. 99, 381 F.2d 267 (1967).[2] But in this area of the law where there are "medieval if not Byzantine peculiarities," New England Power Co. v. Asiatic Petroleum Corp., 456 F.2d 183 at 189 (CA1, 1972), this circuit has spoken.

[1, 2] We, therefore, amend the third from the last paragraph of our opinion [490 F.2d 182] so as to read as follows:

> We are not persuaded by the City's insistence that it will have to appeal in two circuits in order to secure review of all the issues in the case. The arbitration order was an appealable final order within the meaning of 28 U.S.C. § 1291. See La Nacional Platanera v. North American Fruit & Steamship Corp., 84 F.2d 881 (CA5, 1936). Since the time for appealing it has long since run out, the City has

1. Shanferoke Coal & Supply Corp. v. Westchester Service Corp., 293 U.S. 449, 55 S.Ct. 78, 79 L.Ed. 583 (1935), is not contrary to our holding. There an order denying a stay pending arbitration was held not final, although it was deemed appealable as an interlocutory injunction within the meaning of 28 U.S.C. § 1292(a)(1). The present case concerns not a 9 U.S.C. § 3 stay order alone, but a § 4 arbitration order, which stands on a different footing. See The Sydfold, 25 F.Supp. at 663; New England Power Co. v. Asiatic Petroleum Co., 456 F.2d 183, 188 (CA1, 1972). Since the arbitration-compelling order was final, all that had gone before, including the stay order and the denial of the motion to remand, merged with it and became mandatorily appealable. See 9 Moore's Federal Practice ¶ 110.07 at 109, text accompanying note 13.

2. See also Standard Chlorine of Delaware v. Leonard, 384 F.2d 304 (CA2, 1967), in which the Second Circuit rationalized its previously inconsistent decisions by distinguishing between the case where the § 4 order is entered in an independent proceeding and that where entered as a collateral matter in a pending case. And see Goodall-Sanford, Inc. v. United Textile Workers, 353 U.S. 550, 77 S.Ct. 920, 1 L.Ed.2d 1031 (1953) (order directing arbitration under § 301(a) of the Taft-Hartley Act held appealable as final order).

lost its right to have it reviewed. The denial of the motion to remand, although it would not have been immediately appealable standing alone, merged with the final arbitration order and became reviewable. Thus time has run out on it, too.

Also we delete footnote 7 [p. 184].

On the basis of our opinion as amended and as supplemented by this order, the petition for rehearing is denied.

Adm. Office, U.S. Courts—West Pu' ' ing Company, Saint Paul, Minn.

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

June 10, 1974

600 Camp St. - Rm. 102
New Orleans, La. 70130

Mr. Carl R. Pennington, Jr.
Attorney-at-Law
P.O. Box 3985
Tallahassee, Florida 32303

No. 73-1367 - City of Naples vs. The Prepakt Concrete Company and American Employers' Insurance Company.

MANDATE STAYED TO: July 10, 1974
(See order enclosed)

Dear Sir:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38LW 3502).

Enclosed is a copy of the opinion, judgment and order denying rehearing which are still required by the Supreme Court to be incorporated as an appendix to your petition.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By Lawrence Lee
Deputy Clerk

enc.
cc and copy of order:

Mr. Mark Hicks
Mr. John C. Ausley
Mr. Leslie Hynes
Mr. Charles K. Allan

Appendix C

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
JUN 10 '74
EDWARD W. WADSWORTH
CLERK

CITY OF NAPLES,

Plaintiff-Appellee,

versus

THE PREPAKT CONCRETE COMPANY and AMERICAN EMPLOYERS' INSURANCE COMPANY,

Defendants-Appellants.

No. 73-1367

ON CONSIDERATION OF THE APPLICATION of the appellee in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellee to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issuance of the mandate of this Court in said cause be, and the same is stayed for a period of 30 days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within 30 days from the date of this order there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition has been filed. IT IS FURTHER ORDERED that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of 30 days from the date of this order, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

UNITED STATES CIRCUIT JUDGE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1973

No. 73-1367

D. C. Docket No. CA 70-923

CITY OF NAPLES,
Plaintiff-Appellee,

versus

THE PREPAKT CONCRETE COMPANY and
AMERICAN EMPLOYERS' INSURANCE COMPANY,
Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Florida

Before THORNBERRY, GODBOLD and CLARK, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the injunction of the District Court in this cause be, and the same is hereby, vacated with direction that the arbitration record be transmitted to the District Court for the Northern District of Ohio in accordance with the opinion of this Court;

It is further ordered that plaintiff-appellee pay to defendants-appellants, the costs on appeal to be taxed by the Clerk of this Court.

February 22, 1974

Issued as Mandate: